1957

Carl Emil Treutle v. District Court of the Third Judicial District and Viola M. Treutle : Plaintiff's Brief

Utah Supreme Court

John H. Snow; Skeen, Worsley, Snow & Christensen; Attorneys for Plaintiff;

IN THE SUPREME COURT
of the
STATE OF UTAH

CARL EMIL TREUTLE,

Plaintiff,

vs.

THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, and VIOLA M. TREUTLE,

Defendants.

No. 8743

PLAINTIFF'S BRIEF

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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vs.	:	ANSWER
THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, and VIOLA M. TREUTLE,	:	No. 8743
Defendants	:	

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COMES NOW defendants and in answer to the complaint of plaintiff admit, deny and allege as follows:

1. Admits the allegations contained in paragraphs 1, 2, 3, 4 and 5.

2. In answer to paragraph 6, defendants admit that the Findings of Fact, Conclusions of Law and Decree actually state the occurence at the time defendant's decree of divorce was granted.

Defendants admit that there were no stenographic records made of the hearings, either on the 28th of December or on the 5th of March, 1957.

3. In answer to paragraph 7, defendants admit that the Decree of Court which was entered was based on the evidence adduced before the Court on the 28th of December, 1956, and was not based on evidence adduced on the 5th of March, 1957. Defendants deny that the Court was without jurisdiction or that any rule or regulation, statute or law was in any violation, and further answering said paragraph allege that the Court's jurisdiction at that time was complete.

4. In answer to paragraph 8, defendants admit that the minutes

of the Court are not accurate in the statement that the defendant, Viola M. Treutle, appeared before the Court on the 5th of March, 1957. Further answering said matter, these defendants allege that said inaccuracy is immaterial since the Court had already received evidence sufficient to justify the Decree of Court which was entered and upon which there was hearing on December 28, 1956.

5. In answer to paragraph 8, defendants allege as follows: that the Findings of Fact and Conclusions of Law accurately state the occurences; that on the 20th day of September, 1956 defendant, Viola M. Treutle, filed her complaint in the above entitled action praying for a divorce; that on said date the said Viola M. Treutle had been for more than three months preceding the filing of the complaint an actual and bona fide resident of the State of Utah and the County of Salt Lake. That following the filing of her complaint the defendant, Viola M. Treutle, sought through every means available to ascertain the residence of the plaintiff.

That on the 28th of December, 1956, the cause of action filed by defendant, Viola M. Treutle, was then pending in the Third Judicial District Court, in and for Salt Lake County, that on said date it appeared to defendant, Viola M. Treutle, that she would not be within the State of Utah since the United States Government had indicated to her that employment for her was available in Washington D.C. That shortly after the 28th of December, 1956 defendant, Viola M. Treutle, left the State of Utah, pursuant to the request of her employer, the United States of America, and went to Washington D.C., where she was temporarily employed; that at no time during the pendency of the action did the defendant, Viola M. Treutle, ever abandon her residence in the State of Utah and while from the State of Utah leased the home which she resided in and which she purchased while personally within the State.

Defendant, Viola M. Treutle, denies that the defendant, Third Judicial District Court, ever lost jurisdiction once the same had been established but alleges that she was actually a bona fide resident of the State of Utah even though temporarily residing in Washington D.C.; that following her employment with the United States Government, defendant, Viola M. Treutle, returned to Salt Lake City, Utah, and now resides in said city.

6. Defendants deny the allegations in paragraphs 9, 10, 11 and 12.

7. As a further defense to the complaint of plaintiff, defendants allege that said complaint fails to state any cause of action whatsoever which is cognizable in the Supreme Court of the State of Utah.

8. These defendants further allege that plaintiff had an adequate and speedy remedy and at any time prior to the time when the divorce became final on September 12, 1957, could have appeared in the Third Judicial District Court to contest the jurisdiction of the Court over him either specially or could have made a general appearance in said Court.

9. Defendants further allege that the only reason that the plaintiff has failed to appear in the action before the Third Judicial District Court is that said plaintiff seeks to avoid the obligations placed upon him by the laws of the State of Utah for support for defendant, Viola M. Treutle and the minor child of the marriage, Carl Emil Treutle, Jr.

10. Further answering the complaint of plaintiff, these defendants allege that prior to the publication of notice in the Third Judicial District Court action, defendant inquired in New York City, Caracas, Venezuela, and all other places where she had reason to believe that the plaintiff might be and attempted to obtain personal service upon the said plaintiff by placing summons

and copies of the complaint in the hands of the public officials in New York City and in Caracas, Venezuela.

That defendant, Viola M. Treutle, was unable to obtain personal jurisdiction over the plaintiff and was unable to obtain any service upon him personally either at Caracas, Venezuela or in New York City; that defendant, Viola M. Treutle's efforts extended from the 20th of September, 1956 through the 28th of December, 1956 without success; that when it appeared to defendant, Viola M. Treutle, that she was not going to be able to obtain personal service on plaintiff it was only then that an Order was sought to serve the same on plaintiff by publication.

The defendants allege that the service by publication was in all respects regular; that jurisdiction was obtained by the Third Judicial District Court and that the Court entered its judgment in accordance with law based upon evidence properly adduced before it after jurisdiction by publication had been obtained in accordance with the statutes of the State of Utah.

Defendants further allege that for this Court to intervene and assist the plaintiff in avoiding his obligations for support and alimony to the defendant, Viola M. Treutle, and her minor child, is against the public policy of the State of Utah; that this Court should recall its Writ; should deny the complaint of plaintiff and require of him that he seek his remedy in the Third Judicial District Court, there entering a general appearance so that the Court will have jurisdiction over him and can make such orders as will be justice and equitable between the parties, and for this Court to permit him to avoid general jurisdiction by a complaint in the Supreme Court violates the public policy of the State of Utah since said public policy requires of fathers to support their minor children and of husbands that they provide

alimony for their wifes who are in necessitous circumstances.

WHEREFORE defendants pray that this Court recall its Writ and that plaintiff be required to seek his remedy in the Third Judicial District Court, if any he has, either by special appearance at that Court or by a general appearance so that the Court would have jurisdiction over him and can make such orders concerning the right of defendant, Viola M. Treutle, for support and alimony as will do justice between the parties.

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The foregoing Answer was served by mailing a copy thereof to John H. Snow, Attorney for plaintiff, 1501 Walker Bank Building, Salt Lake City, Utah, this ___ day of September, 1957.

tuted in that court by defendant Viola M. Treutle against this plaintiff.

STATEMENT OF FACTS

On September 20, 1956, defendant, Viola M. Treutle, filed her complaint in the District Court of Salt Lake County, praying for a decree of divorce awarding her $500.00 per month support money, $500.00 per month alimony, an attorney's fee of $500.00, and the care, custody and control of the minor child of the parties. This action was assigned Civil No. 109931, in defendant Court (R. 2).

On December 17, 1956, 87 days after the complaint was filed, a summons was apparently signed by defendant's counsel, Dwight L. King (R. 10). The original summons contains a date and time stamp, indicating it was received by the Sheriff of the *City of New York,* December 19, 1956 (R. 10). It is not clear why the summons was sent to the Sheriff of the City of New York, in view of the allegations of the complaint, that the plaintiff's "earnings" are "outside of the United States," but in any event, on March 5, 1957, the New York City Sheriff filed his return indicating the summons and complaint had not been served as of February 25, 1957.

Although no other summons or notice of any kind had been given to the plaintiff herein, defendant court on December 28, 1956, conducted a purported hearing

of the divorce action, as revealed by the following entry on the official minutes of that court:

> "The within entitled matter now comes before the Court for hearing, the plaintiff and her counsel, Dwight L. King being present in person; the defendant not appearing or being represented by counsel. Whereupon Viola M. Treutle is sworn and examined. The Court, now being fully advised in the premises, orders that the plaintiff's testimony is perpetuated." (R. 5)

As admitted in the defendant's answer on file in this Court, no stenographic record was made of this purported hearing. No record of any kind is found in the court's file concerning the "perpetuated" testimony purportedly given by the defendant Viola M. Treutle on that day.

At the time of this so-called "hearing," Mrs. Treutle knew she was about to leave this state, and shortly thereafter she left Utah to accept employment in Washington, D. C. (Defendant's answer Page 2). On January 4, 1957, Dwight L. King signed a written motion informing the court of the address of this plaintiff in the city of Caracas, Venezuela, and moving the court for an order of publication of summons in the Salt Lake Times, a newspaper of general circulation (R. 7). Pursuant to this motion, the District Court, by Joseph G. Jeppson, Judge, entered its order directing that summons be published upon this plaintiff, in that newspaper, once each week for a period of four successive weeks.

It was further ordered that within ten days the County Clerk should mail a copy of the summons and complaint to this plaintiff in Venezuela (R. 6).

Publication was completed on February 8, 1957, as evidenced by the affidavit of the publisher, which was filed in the court March 5, 1957, although dated February 8, 1957 (R. 9).

On March 5, 1957, plaintiff's counsel appeared before the court to obtain the "decree of divorce." The Findings of Fact and Conclusions of Law of the defendant court state that the divorce action "came on regularly to be heard before" the defendant court on that day (R. 17). The same language is to be found in the Decree (R. 21). The Findings, Conclusions and Decree were signed and entered March 12, 1957.

At the time of the purported "regular hearing" of the divorce action on March 5, 1957, service of summons upon this plaintiff was not yet complete, inasmuch as the Clerk of the defendant court had not then made his affidavit that he had mailed a copy of the complaint and summons to this plaintiff, as required by Rule 4(f)(1), Utah Rules of Civil Procedure and as ordered by the court on January 4, 1957 (R. 16). It is also noted in the defendant court's record that the return of process by the Sheriff of the City of New York and the affidavit of the publisher of the Salt Lake Times were each filed on the same day as the purported hearing (See R. 9,

and the return of the Sheriff, which is not numbered but which follows Record 14).

Upon this state of the record the defendant court made its official minute entry reading as follows:

> "This case comes now on before the Court for hearing, the plaintiff appearing in person and being represented by Dwight L. King as counsel; the defendant not appearing either in person or by counsel. A proof of publication of summons being of record and on file herein, the default of the defendant is ordered entered. Plaintiff is sworn and examined in her own behalf. Upon the evidence adduced, the court orders that plaintiff be granted an interlocutory decree of divorce from the defendant as prayed." (R. 15)

These official minutes of the court are in direct conflict with the Findings of Fact, Conclusions of Law and Decree, inasmuch as the latter documents contain the statement that the plaintiff appeared "by her attorney," whereas in the minutes it is said that she appeared in person and was "sworn and examined in her own behalf." There are further conflicts in that the minutes indicate that the decree of divorce was granted "as prayed," whereas the actual decree is not in conformity with the prayer of the complaint (R. 21, 22).

Defendants' answer in the Supreme Court admits there was no stenographic record made of the "hearing" of March 5 and that the decree of March 12 was based upon evidence which was claimed to have been adduced

and "perpetuated" before the court December 28, 1956. It is further admitted that there was no evidence presented March 5, and that the decree was not based on evidence adduced on March 5, 1957. The described contradictions between the minutes and decree of the court are also conceded by the defendants' answer.

Plaintiff commenced this original proceeding by filing his complaint against Mrs. Treutle and the District Court of Salt Lake County. Upon this complaint, a Writ in the nature of a Writ of Certiorari was issued by this Court on September 16, 1957. The record of proceedings before the District Court was filed in this Court on September 26, 1957. By his complaint plaintiff seeks an order of this Court vacating and annulling the purported decree of divorce.

STATEMENT OF POINTS

POINT I.

THE DISTRICT COURT EXCEEDED ITS JURISDICTION IN GRANTING A DECREE OF DIVORCE WHEN THERE WAS NO "LEGAL EVIDENCE TAKEN IN THE CAUSE," AS REQUIRED BY SECTION 30-3-4, UTAH CODE ANNOTATED, 1953.

POINT II.

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTER THE DECREE OF DIVORCE AND EXCEEDED ITS JURISDICTION, IN THAT SUMMONS DID NOT ISSUE WITHIN THREE MONTHS FROM THE DATE OF THE FILING OF THE COMPLAINT.

ARGUMENT

POINT I.

THE DISTRICT COURT EXCEEDED ITS JURISDICTION IN GRANTING A DECREE OF DIVORCE WHEN THERE WAS NO "LEGAL EVIDENCE TAKEN IN THE CAUSE," AS REQUIRED BY SECTION 30-3-4, UTAH CODE ANNOTATED, 1953.

It is admitted by the defendants that defendant Viola M. Treutle made but one personal appearance before the District Court during the time that her action for divorce was pending in that court. This appearance was made December 28, 1956, but there is no way for this Court, or this plaintiff, to determine what, if any, evidence was presented on that occasion. It is not known whether she appeared in open court, or in chambers.

In any event, it is admitted, in defendants' answer, that no stenographic notes were taken. No other written record was made to reflect the actual words spoken or even to record the substance of whatever it was that Mrs. Treutle told the court on that occasion.

The only record which can be found is contained in the minutes of the defendant court, wherein it is stated that Mrs. Treutle was sworn and examined and the court ordered that her testimony "is perpetuated" (R. 5). Where, or how, or in or on what, it is perpetuated is not revealed.

This was not a case in which it was permissible to perpetuate testimony. Rule 27(a), Utah Rules of Civil Procedure, provides in great detail for the cases and circumstances in which testimony may be perpetuated. The rule is clear that perpetuation is permitted in those instances in which a suit has not been filed but is expected to be filed, and it is believed that the testimony which is to be perpetuated will not be available at the time it will be required in the conduct of such anticipated suit.

The rule contains strict requirements that notice to the expected adverse party must be given at least 20 days prior to the date that the applicant will appear before the court and seek its order authorizing perpetuation.

Here, suit was not anticipated since it had already been filed. The rule covering such a situation is Rule 26, which authorizes depositions of any party and provides the method by which notice to interested parties should be given.

The defendants complied with neither of these rules and even if the testimony on December 28, 1956, had been recorded in writing it would have no more effect than an *ex parte* affidavit. It cannot even rise to the stature of an affidavit, however, because nowhere is its substance or effect recorded, except in the minds of those who may have chanced to hear it. How it could be "perpetuated" in such a fashion must remain a mystery.

Webster defines the term "perpetuate" as meaning "to make perpetual; to give an enduring character or existence to a thing." Merely to state the definition reveals how completely the defendants failed to perpetuate the testimony of the defendant Viola M. Treutle.

Despite this obvious failure to comply with fundamental statutory and constitutional law, the District Court, without ever seeing Mrs. Treutle again, and without any further evidence being taken in the cause, nevertheless, on March 12, 1957, made and entered its purported Findings of Fact, Conclusions of Law and Decree of Divorce.

At the time in question, Section 30-3-4, Utah Code Annotated, 1953, provided in part as follows:

> ". . . No decree of divorce shall be granted upon default or otherwise, *except upon legal evidence taken in the cause* . . . and the court in all divorce cases shall make and file its findings and decree *upon the evidence.*" (emphasis added.)

The phrase "legal evidence taken in the cause" means evidence which the law recognizes as proper and admissible, and of sufficient substance that the court may safely base its decree thereon. 31 *Corpus Juris Secundum* Evidence, p. 506, and cases there cited. It means also such evidence that is presented to the court in a proper and legal manner in compliance with the Constitution, the Statutes and the Rules of Procedure, all of which are designed to insure that no right of any person shall

be taken from him except after full compliance with the fundamental requirements of due process of law.

The phrase "legal evidence taken in the cause" must also mean that the evidence to support a divorce decree must be sufficient to satisfy the requirements of law and the interest of the state, which is also an interested party in divorce actions. Nothing less than this standard will be sufficient.

These principles have been recognized by this Court for many years. In the case of *Hyrup vs. Hyrup,* 66 Utah 580, 245 Pac. 335, it was said:

> "Courts are not authorized to grant divorces except for the particular causes prescribed by law, and then only when the grounds or cause for divorce is proved by substantial and satisfactory evidence."

This decision has been repeatedly quoted with approval by this court as is evident in the case of *Greener vs. Greener,* (*Utah* 1949) 212 P.2d 194.

Our system of jurisprudence, which has been painstakingly developed in the last several hundred years, has been modified and simplified as the needs of the people and the courts have required, but despite these changes, there still is a basic and fundamental requirement that the records of the courts shall be so meticulously maintained that an independent and objective examination of such records can reveal all the evidence

and all of the facts upon which the judgment of the court was based.

Despite this recognized principle, we are here confronted with a purported "Decree of Divorce" based upon purported "Findings of Fact," which are in direct conflict with the official minutes of the defendant Court, and none of these are supported by *any* evidence recorded in *any* place by *any* officer or official of the defendant court at *any* time during the progress of the action.

Yet it was upon this so-called evidence, received without notice of any kind, and nowhere recorded, that the court based its purported Decree. Under such circumstances it seems appropriate to quote the language of this Court in a case decided nearly 30 years ago, in which it was said:

> "The Court may have jurisdiction over the subject matter and of the parties and still the judgment or Decree be void because the procedure employed by the Court was such that the Court was not authorized to assert its power in that way." *Hampshire vs. Woolley, Judge.* (Utah, 1928), 72 Utah 106, 269 Pac. 135.

POINT II.

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTER THE DECREE OF DIVORCE AND EXCEEDED ITS JURISDICTION, IN THAT SUMMONS DID NOT ISSUE WITHIN THREE MONTHS FROM THE DATE OF THE FILING OF THE COMPLAINT.

The complaint of defendant Viola M. Treutle was filed on September 20, 1956. Under the provisions of Rule 4(b), Utah Rules of Civil Procedure, summons "must" issue within three months from the date of such filing.

A summons is deemed to have issued when signed by the plaintiff or her attorney and placed in the hands of a qualified person for the purpose of service. Rule 4(a), Utah Rules of Civil Procedure.

A "qualified person" is defined by Rule 4(d), Utah Rules of Civil Procedure, and in the case of service in another state, includes "the sheriff of the *county* where the service is made." A Sheriff of a city located in a state other than Utah is not a person by whom summons may be served.

Under our rule, Summons "must" issue within three months from the filing of the complaint, and, as was said in *Thomas vs. District Court* (Utah, 1946) 171 P. 2d 667:

> "It is the general rule, that, if a statute prescribes a method for serving process, the method must be followed."

Since no summons was placed in the hands of a qualified person within three months from the date of filing the complaint, it follows that the defendant District Court was without jurisdiction and acted in excess of its jurisdiction in conducting a hearing on the merits

of the case on December 28, 1956, and, thereafter, on March 5, 1957, in granting a purported decree of divorce, which it proceeded to enter March 12, 1957.

CONCLUSION

The record certified to this Court shows a complete disregard of fundamental procedural requirements. Such disregard is of particularly vital significance where, as here, the purported decree affects the status of the parties and that of their minor child. The state, as well as these parties, has an interest in the orderly determination of questions affecting this status.

The hearings were had and the decree entered without satisfying even the most elementary demands of due process and at a time when the District Court had no jurisdiction to proceed. Accordingly, the purported decree should be vacated and annulled by order of this Court.

Respectfully submitted,

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